



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ICF Incorporated

File: B-241372

Date: February 6, 1991

W. Stanfield Johnson, Esq., Crowell & Moring, for the protester.
Nora Lee, Technical Resources, Inc., and Edward R. Saltzberg, Viar & Co., interested parties.
David J. O'Connor, Office of Administration and Resources Management, Environmental Protection Agency, for the agency.
Glenn G. Wolcott, Esq., Paul I. Lieberman, Esq., John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly excluded "response action contractors" (RACs) from competing for contract where contracting officer reasonably determined that the objectivity of such contractors could be impaired when performing specific tasks contemplated under the protested solicitation which could affect work being performed for agency by RACs.
2. Agency properly excluded protester from competing on the basis of its corporate relationships with sister corporations which hold "response action" contracts.
3. Agency may impose restrictions with respect to possible conflicts which are not explicitly provided for in applicable law or regulation where the needs of the agency or the nature of the procurement dictates the use of such restrictions.
4. Company that is properly excluded from competition on basis of an organizational conflict of interest is not an interested party to challenge solicitation requirements with which the successful offeror must comply.

DECISION

ICF Incorporated (ICF) protests the Environmental Protection Agency's (EPA) decision to disqualify ICF from competing under request for proposals (RFP) No. W001503-D1, for advisory and analytical assistance support for management of EPA's Superfund program. EPA's determination was based on its conclusion that other work under the Superfund program which

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was being performed by ICF affiliates provided a basis for actual or potential organizational conflicts of interest.

We deny the protest in part and dismiss it in part.

BACKGROUND

The purpose of this procurement is to provide support to EPA in planning, managing, implementing and evaluating EPA's Superfund program. Prior to issuing the solicitation, the EPA contracting officer examined the proposed statement of work (SOW) to identify potential conflicts of interest that might arise under the specific requirements of this contract. The contracting officer determined that, for 10 of the 11 work-assignment areas within the SOW, there was a significant potential for conflicts of interest for contractors who also performed "response action" work.^{1/}

For example, the contracting officer found that the SOW called for the successful offeror to investigate the efficiency of "response action contractors" (RACs) and to make recommendations regarding measures to reduce program management costs for those contracts. The contracting officer concluded that a contractor who was also a RAC might, intentionally or inadvertently, overlook some recommendations for economy and efficiency because of the potential loss of revenue resulting from such recommendations. The contracting officer also found that the SOW called for the successful offeror to assist in drafting guidelines for procedures to be undertaken in investigating suspected hazardous waste sites.^{2/} The contracting officer concluded that if the contractor performing under the protested procurement was also involved in performing the "response action" work to which such guidelines applied, there was the potential for the contractor to recommend extensive procedural requirements that would increase revenues for RACS, but that might not be most cost effective for the Government.

Accordingly, section L.18 of the RFP, which was issued on July 13, 1990, stated that contractors who would be considered RACs at the time of contract award would be ineligible to compete due to the potential conflict of interest. Section L.19 of the RFP further indicated that a firm could become

^{1/} Section L.17 of the RFP defines "response action" work to include activities at a Superfund site involving removal or remediation of hazardous substances along with activities supporting or related to such removal or remediation.

^{2/} Investigation of hazardous waste sites is "response action" work normally performed by RACs.

disqualified, though not a RAC itself, if it were affiliated with a sister corporation that was a RAC or was otherwise controlled by an entity that also controlled a RAC.

The RFP provided for the procurement to be conducted in two phases. In phase I, potential offerors were required to submit statements demonstrating to the contracting officer's satisfaction that they were not RACs. In phase II, offerors were to submit cost and technical proposals. On or before July 27, EPA received submissions from more than 20 potential offerors, including ICF, responding to phase I of the procurement. In each of these submissions, the potential offeror indicated it was not a RAC.

On August 23, 1990, the contracting officer advised ICF of her preliminary determination that ICF must be treated as a RAC. This preliminary determination was based on the fact that ICF was a wholly-owned subsidiary of American Capitol and Research Corporation (ACR), and that ACR was the sole stockholder of two other subsidiaries holding response action contracts. In response to the contracting officer's preliminary determination, ICF submitted information regarding its corporate structure, its activities and its interaction with its parent and sister corporations. ICF personnel also discussed the matter with EPA officials on several occasions in an attempt to obtain a reversal of the preliminary determination.

On September 26, 1990, the EPA contracting officer issued her final determination excluding ICF from the competition on the basis of the potential conflict of interest created by ICF's relationships with its parent and sister corporations. The contracting officer acknowledged that ICF had suggested a variety of measures to prevent communications between it and its sister corporations including: training employees to recognize and avoid conflicts of interest; removing certain members of ICF's Board of Directors; restructuring ICF's office space; eliminating ICF's reliance on personnel of its parent corporation for certain procurement functions; and making structural changes to the corporate relationship between ICF and its sister corporations.

In concluding that an actual or potential conflict of interest existed, the contracting officer noted that the measures proposed by ICF only tended to limit communications between ICF and its sister corporations. The contracting officer concluded that such limitation of communications did not eliminate the potential conflict of interest since ICF need not communicate with its sister corporations to advance their financial interests.

EXCLUSION OF RACS

ICF first protests that the exclusion of RACs violates the requirements for full and open competition contained in the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR). We disagree.

A procuring agency's exclusion of potential offerors on the basis of actual or potential conflicts of interest does not violate CICA's requirement for full and open competition. See, e.g., Arthur Young & Co., B-226626, June 12, 1987, 87-1 CPD ¶ 591; Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107. The FAR expressly states that a conflict of interest exists when the contractor's objectivity may be impaired due to the nature of the work to be performed. FAR § 9.504. The FAR further makes the contracting officer responsible for identifying and resolving conflicts with regard to a particular procurement and states that in doing so, the contracting officer shall exercise "common sense, good judgement and sound discretion". FAR §§ 9.504, 9.505. As recently amended by Federal Acquisition Circular (FAC) 90-1, October 22, 1990, the FAR expressly directs a contracting officer to withhold a contract award when a conflict cannot be avoided or mitigated. FAR § 9.504(e). Our Office will overturn the contracting officer's determination regarding a conflict of interest only if it is shown to be unreasonable. Radiation Safety Serv., Inc., B-237138, Jan. 16, 1990, 90-1 CPD ¶ 56; Battelle Memorial Inst., B-218538, June 26, 1985, 85-1 CPD ¶ 726.

While ICF asserts that EPA failed to examine the specific facts and nature of the particular contracting situation created by this procurement, the record discloses otherwise. As noted above, the contracting officer performed a comprehensive analysis regarding the tasks to be performed and the potential impact such performance could have on RACs. The contracting officer identified several specific situations in which the objectivity of a RAC might be impaired in performing the work contemplated. Accordingly, we find that the contracting officer reasonably and properly determined to exclude RACs from this particular procurement.^{3/}

^{3/} Our determination is based on the considerable attention given by the EPA contracting officer to the requirements of this particular RFP and does not constitute approval of the blanket exclusion of a class of potential contractors on other EPA contracts without a comprehensive consideration of the particular work to be performed.

ICF'S RELATIONSHIPS WITH RACS

ICF also protests that its exclusion from the competition was improperly based on EPA's determination that ICF was affiliated with RACs, despite the fact that ICF was not itself a RAC.

EPA considered the fact that several corporate changes and reorganizations had recently reshuffled the organization charts of ICF and its parent and sister corporations. One of ICF's sister corporations now holding response action contracts had originally been formed as a wholly-owned subsidiary of ICF. Corporate restructuring had only recently altered the organization chart so that, at the time ICF responded to the RFP, it no longer owned that RAC. The EPA contracting officer reached her final determination after considering both the present and recent past corporate structure of ICF and its parent and sister corporations.

EPA's determination to exclude ICF is consistent with the FAR, as amended by FAC 90-1. FAR § 9.501 states:

"'Organizational conflict of interest' means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government"

Based on the careful consideration given by EPA to the particular facts surrounding ICF's relationships with RACs, we conclude that EPA's disqualification of ICF with regard to this particular procurement was reasonable and permissible. EPA reasonably determined that ICF was potentially unable to render impartial assistance or advice to the government due to its relationship with other corporations holding response action contracts. See Cardiocare, a div. of Medtronic, Inc., 59 Comp. Gen. 355 (1980), 80-1 CPD ¶ 237.

EPA'S PROPOSED REGULATIONS

In April, 1990, EPA published proposed regulations regarding, among other things, potential organizational conflicts of interest. 55 Fed. Reg. 17,724 (1990). The Office of Management and Budget (OMB) declined to approve these regulations for various reasons. Among other things, OMB asked EPA to explain the basis for excluding offerors due to "potential" conflicts of interest. ICF protests that EPA may not preclude RACs from competing for this contract without having first obtained OMB's approval. We disagree.

Our Office has recognized that a contracting agency may impose a variety of restrictions pertaining to potential

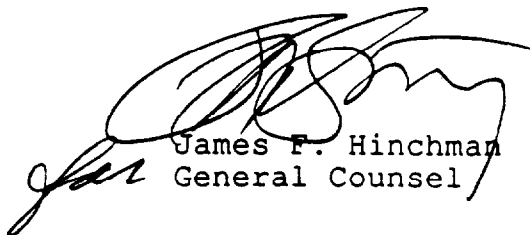
organizational conflicts of interest, not explicitly provided for in applicable law or regulations, when the needs of the agency or the nature of the procurement dictate the use of such restriction, even where the restriction has the effect of disqualifying particular firms from receiving an award because of a conflict of interest. Radiation Safety Servs., Inc., B-237138, supra; Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107; R.W. Beck & Assocs., B-218457, July 19, 1985, 85-2 CPD ¶ 60. Thus, OMB concurrence with the proposed EPA regulations was not a prerequisite to EPA's restrictions under this solicitation.

With regard to EPA's procurement actions involving potential conflicts of interest, we note that various reports of the General Accounting Office have recently addressed this matter. In Contractors are Being Too Liberally Indemnified by the Gov't, GAO/RCED 89-160, September 26, 1989, GAO concurred with EPA's decision to curtail a policy contractor's activities regarding indemnification of RACs, due to the fact that the contractor was itself an indemnified RAC. In Superfund Contracts: EPA's Procedures for Preventing Conflicts of Interest Need Strengthening, GAO/RCED-89-57, February 17, 1989, GAO recommended that EPA improve its procedures for avoiding organizational conflicts of interest under its Superfund program by documenting actions taken by contracting officers to resolve such conflicts. In our view, EPA's restriction on RAC participation in this procurement reflects its increased awareness of the potential for such conflicts. Under these circumstances, we do not believe that it is unreasonable for EPA to prohibit RAC participation here, despite the fact that more than 5 years ago EPA was willing to permit RACs to compete under a procurement for similar work. See Battelle Memorial Inst., B-218538, supra.

RESTRICTIONS AND CERTIFICATION REQUIREMENTS FOR AWARDEE

Finally, ICF protests that the RFP established overly burdensome restrictions and certification requirements with which the successful offeror must comply. Since ICF was properly excluded from competing for this procurement, ICF is not an interested party to protest the requirements with which the successful offeror must comply. 4 C.F.R. §§ 21.0(a) and 21.3(m) (1990).

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel